

ORIGINAL



BEFORE THE ARIZONA CORPORATION COMMISSION

28

COMMISSIONERS

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

In the matter of:

YUCATAN RESORTS, INC.,
3222 Mishawaka Avenue.
South Bend, IN 46615;
P.O. Box 2661
South Bend, IN 46680;
Av. Coba #82 Lote 10, 3er. Piso
Cancun, Q. Roo
Mexico C.P. 77500

YUCATAN RESORTS, S.A.,
3222 Mishawaka Avenue.
South Bend, IN 46615;
P.O. Box 2661
South Bend, IN 46680;
Av. Coba #82 Lote 10, 3er. Piso
Cancun, Q. Roo
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RESORT HOLDINGS INTERNATIONAL, INC.,
3222 Mishawaka Avenue
South Bend, IN 46615;
P.O. Box 2661
South Bend, IN 46680;
Av. Coba #82 Lote 10, 3er. Piso
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DOCKET NO. S-03539A-03-0000

**SECURITIES DIVISION'S RESPONSE
TO RESPONDENTS' MOTION TO
DISMISS THE TEMPORARY CEASE
AND DESIST ORDER**

AZ CORP COMMISSION
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1 **WORLD PHANTASY TOURS, INC.,**)

2 **a/k/a MAJESTY TRAVEL**)

3 **a/k/a VIAJES MAJESTY**)

4 Calle Eusebio A. Morales)

5 Edificio Atlantida, P Baja)

6 APDO, 8301 Zona 7 Panama,)

7 **AVALON RESORTS, S.A.**)

8 Av. Coba #82 Lote 10, 3er. Piso)

9 Cancun, Q. Roo)

10 Mexico C.P. 77500)

11 **MICHAEL E. KELLY and LORY KELLY,**)

12 husband and wife,)

13 29294 Quinn Road)

14 North Liberty, IN 46554;)

15 3222 Mishawaka Avenue)

16 South Bend, IN 46615;)

17 P.O. Box 2661)

18 South Bend, IN 46680,)

19 Respondents.)

20 The Securities Division of the Arizona Corporation Commission ("Division") hereby
 21 responds to Respondents' Motion to Dismiss the Temporary Cease and Desist Order ("Motion to
 22 Dismiss"). In short, this Motion to Dismiss argues two points: that the Division's administrative
 23 action in this matter should now be dismissed because it should have been filed against Respondents
 24 earlier, and that the administrative action should be dismissed because the Division was not yet ready
 25 to file against the Respondents. Not only is Respondents' argument at odds with itself, but it lacks
 26 any factual or legal basis. Accordingly, the Motion to Dismiss should be denied.

MEMORANDUM OF POINTS & AUTHORITIES

DISCUSSION

22 Respondents' Motion to Dismiss is premised on two competing themes: that the Division
 23 was aware of Respondents' "business activities" well before it took administrative action in this
 24 matter, and that the Division had yet to complete its investigation into the business activities of
 25 Respondents when it filed a Temporary Cease and Desist Order in this matter. Presenting arguments
 26 about premature action and undue delay in the same motion is untenable on its face. More

1 importantly, both these claims are patently false; the Division took action in this matter at precisely
2 the moment it possessed sufficient evidence to establish that Respondents were in violation of the
3 Securities Act of Arizona ("Securities Act").

4 ***I. Being "aware of business activities" does not equate with having sufficient***
5 ***evidence to prove that Respondents are in violation of the Securities Act***

6 In their Motion to Dismiss, Respondents first suggest that because the name Yucatan Resorts
7 surfaced in connection with prior investigations and administrative actions, the Division was
8 somehow "aware of the business activities" of the Respondents and should have taken action against
9 Respondents at that point, if at all. This assertion is nonsense. It is readily apparent that learning the
10 name or existence of a business entity is hardly the same as having sufficient evidence to allege that
11 the business is in fact violating the registration and/or fraud provisions of the Securities Act.

12 Ignoring this distinction, Respondents point to the fact that a Yucatan Resorts sales brochure
13 was acquired in connection with an undercover investigation into the sales activities of a local group
14 of insurance agents. Respondents fail to acknowledge that the Division investigation *involved the*
15 *selling activities of a local group of insurance agents*, not a group of out-of-state issuers. When the
16 Division took action in this particular matter, the action was taken against a group of unregistered
17 sales agents known as the Chamber Group. This outfit was ultimately found liable for selling
18 securities from four separate issuers from around the country; Yucatan Resorts was not one of the
19 four implicated issuers and, in any event, none of the issuers were named in that action.¹

20 Respondents also cite to a civil action taken by the Division in October 2002. In that case,
21 *One Vision Children's Foundation*, a Yucatan Resorts investment was recouped by a court-appointed
22 receiver of One Vision Children's Foundation. Once again, Respondents fully mischaracterize the
23 nature of this investigation. This case actually involved an investigation into the activities of a local
24

25 ¹ Of the four issuers implicated in the Chamber Group hearing, the first (TLC America) was placed into a
26 receivership by SEC regulators, the second (San Clemente Securities) was shut down by federal regulators,
the third (Carrington Estate Planning Services) was shut down by state officials, and the fate of the fourth
(MVP money voucher machines) is to be determined.

1 charitable gift annuity program. Once a receiver was appointed, he immediately began marshalling
2 the Foundation's assets, including a \$1,000,000 investment into Yucatan Resort's Universal Lease
3 program. The Foundation had previously told investors that its charitable gift annuity program
4 would be placing charitable gift annuity monies into well-recognized investing institutions, such as
5 with the broker/dealer Merrill Lynch. In other words, rescission of the Yucatan Resorts investment
6 occurred because it was at odds with the program's purported investment strategy.

7 In sum, the Division may have been aware that Yucatan Resorts was conducting some type of
8 business activities in Mexico by 2002, but that does not mean it had sufficient evidence to file an
9 action against this entity. Only by the following spring, in May 2003, did the Division possess
10 enough evidence to support the allegations against Respondents for registration violations and
11 securities fraud.

12 ***II. Filing a Temporary Order to Cease and Desist to prevent further harm to the***
13 ***citizens of Arizona is not a violation of due process, it is a mandate of this agency***

14 Respondents next argue that by knowing that Yucatan Resorts existed as a business entity in
15 Mexico for some time, the Division's determination to file a Temporary Order to Cease and Desist
16 against the Respondents was improper. The Motion to Dismiss goes so far as to argue that such a
17 filing violated Respondents' due process rights. This position reflects a fundamental lack of
18 understanding as to the purpose and intent behind the authority conferred upon the Division to draft
19 and issue the Temporary Order to Cease and Desist ("TC&D").

20 The TC&D is explicitly designed to target violators of the Securities Act *when the violations*
21 *are on-going*, as a TC&D can immediately demand the cessation of alleged illicit conduct. In this
22 particular instance, where the Division determined that illicit sales of securities were occurring in the
23 tens of thousands of dollars each week - primarily to elderly Arizona investors - the Division had no
24 alternative but to attempt to prevent any further harms by shutting the sales down as promptly as
25 possible. The Division was able to establish enough evidence to support its allegations supporting a
26 temporary order in May 2003. The Division filed a TC&D against Respondents on May 9, 2003.

1 It is a primary mandate for the Division to protect the public from illicitly unregistered and/or
2 fraudulent securities sales. The Division will consequently take appropriate action as soon as it has
3 enough evidence to support its allegations. In some instance, such as where the issuers and
4 principals are located in foreign countries, this process can consume substantial resources and take
5 considerable time. However, as soon as practicable, the Division will file an administrative action.
6 Where the Division determines that the illicit conduct under investigation is on-going, the preferable
7 course is almost always the issuance of a TC&D. This is precisely what occurred in this instance.

8 **III. The concept of laches has no bearing on this case**

9 Finally, Respondents argue that the equitable principal of laches should require the dismissal
10 of this action. This claim rests along familiar lines – that the Division should have filed an action in
11 previous months and that it had waived the right to do so by May 2003. Such a position is at odds
12 with the secondary argument in Respondents' Motion to Dismiss, that the Division was not ready for
13 hearing when it filed the TC&D. Simply stated, it is impossible to reconcile laches with a claim that
14 the Division filed prematurely.

15 Moreover, equitable claims such as laches cannot lie against the State, its agencies or sub-
16 divisions in matters affecting governmental or sovereign functions. *George v. Arizona Corporation*
17 *Commission*, 83 Ariz. 387, 392 (1958); *Mohave County v. Mohave-Kingman Estates*, 120 Ariz. 417,
18 421 (1978); *Maricopa County v. Cities and Towns of Avondale, et al.*, 12 Ariz.App. 109, 113 (1970);
19 *See also Arizona Law Enforcement Merit System v. Dann*, 133 Ariz. 429, 433 (App. 1982)(neither
20 laches nor estoppel can be asserted to gain or defeat rights against the state). As the court in
21 *Maricopa County* added, "neither laches or its generic parent, estoppel, can be asserted to gain rights
22 against the public or to defeat the public's interest." *Maricopa County*, 12 Ariz.App. at 113.

23 With respect to the state or any of its subdivisions, the single exception to the bar against a
24 laches claim is where the state agency acts "within its proprietary capacity." *Arizona Law*
25 *Enforcement Merit System*, 133 Ariz. at 429; *Freightways, Inc. v. Arizona Corporation Commission*,
26 129 Ariz. 245, 248 (1981). In this instance, the Division filed a TC&D against Respondents as a

1 natural governmental function of an agency of the state of Arizona. It was filed to further the
2 public's best interest. This administrative action had nothing to do with any "proprietary functions,"
3 making the single laches exception wholly inapplicable. It follows that the Respondents' laches
4 claim is invalid against this agency as a matter of law.

5 With respect to filing TC&Ds, the Division is influenced by countervailing forces. The
6 Division knows that time can be of the essence is issuing an order, but the Division is also aware that
7 it must have enough evidence to support the allegations contained in the TC&D when it ultimately
8 takes action.² The Division acquired sufficient evidence to draft a TC&D in early May 2003; it filed
9 a TC&D against Respondents on May 9, 2003. Through this act, the Division prohibited
10 Respondents from participating in any further sales activities within this state. Under the
11 circumstances, the Division's course of action was neither premature nor late.

12 CONCLUSION

13 The Division filed a TC&D in this matter as soon as it had a sufficient basis to do so.
14 Accordingly, Respondents' demand to dismiss this action on grounds that the TC&D was either
15 tardy or premature is wholly without merit. It follows that Respondents' Motion to Dismiss should
16 be denied.

17 RESPECTFULLY SUBMITTED this 17th day of October, 2005.

18
19 By: 

20 Jamie B. Palfai

21 Attorney for the Securities Division of the
22 Arizona Corporation Commission
23
24

25 ² Although the Division must have enough evidence to support the allegations set forth in a TC&D before
26 it actually files the order, the act of filing does not, in and of itself, preclude the Division from continuing
its investigation into the acts and activities of named Respondents. *See, e.g., A.R.S. §§ 44-1822; 44-1823(A).*

1 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing
2 filed this 17 day of October, 2005, with

3 Docket Control
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7 COPY of the foregoing hand-delivered this
8 17 day of October, 2005, to:

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10 Administrative Law Judge
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13 Phoenix, AZ 85007

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